No. 2021

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Plaintiff and Defendant in Error,

v.

THE FIDELITY LUMBER COMPANY,
a corporation,
Defendant and Plaintiff in Error.

Brief of Defendant in Error.

Writ of Error from United States Circuit Court, Western District of Washington, holding Terms at Seattle.

F. V. BROWN,
F. G. DORETY,
JAMES B. KERR,
Attorneys for Defendant in Error.

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STATEMENT.

This action was brought in the circuit court of the United States for the western district of Washington by the Great Northern Railway Company against the Fidelity Lumber Company to recover the sum of $2805.65. The jurisdiction of the circuit court rested on diversity of citizenship in that the plaintiff is a Minnesota corporation and the defendant is a Washington corporation. The action was tried before the court,

Judge Hanford presiding, without a jury, upon the pleadings and an agreed statement of facts, and resulted in a judgment in favor of the plaintiff for the full amount demanded.

The conceded facts as shown by the admitted allegations of the complaint and by the agreed statement are as follows:

The plaintiff was a common carrier of freight from points within the states of Washington and Idaho to and ~~1907~~, had, with other carriers, filed and published, under the provisions of the act to regulate commerce, certain tariffs prescribing rates for the transportation of lumber, shingles and other forest products from points in Washington and Idaho to points in other states. Prior to October 31, 1907, the plaintiff and such other carriers filed and published other tariffs which by their terms became effective November 1, 1907, prescribing rates substantially higher than those theretofore in force.

On or about October 31, 1907, by an order of the circuit court for the western district of Washington, the plaintiff and such other carriers were temporarily enjoined from collecting from the Pacific Coast Lumber Manufacturers' Association, the Shingle Mills Bureau, or any of their members or their consignees, rates for the transportation of such commodities higher than the rates which were in effect on October 31, 1907. As a condition of the relief granted by this order the court required those seeking to enjoy its benefits to execute a bond to the carriers to pay the difference be-

tween the old rates and such new rates as should be held reasonable by the Interstate Commerce Commission or by the circuit court. Thereafter the Potlatch Lumber Company and others, including the Fidelity Lumber Company, the defendant in this action, intervened in the suit in which the injunction was granted and the benefits of such injunction were extended to the intervenors upon their giving like security as that before required.

The obligation which the Fidelity Lumber Company assumed in this respect most clearly appears from the pleadings. Paragraph VI of the complaint is as follows (Transcript, page 6):

> "That thereafter the defendant, Fidelity Lumber Company, agreed to and with the Great Northern Railway Company that in accordance with the terms of said order of November 18, 1907, it would pay to the Great Northern Railway Company for and on account of the shipment and transportation of lumber, shingles and forest products under said order from points within to points without the states of Washington and Idaho the difference, if any, between the amount paid for such service at the rate provided by said order of November 18, 1907, and whatever rate should be finally established as the rate lawfully chargeable therefor on and after November 1, 1907."

This paragraph was admitted by paragraph VI of the answer as follows (Transcript, page 10):

> "This defendant admits the allegations of paragraph numbered VI of the complaint, but in this

> connection the defendant alleges that the Interstate Commerce Commission cannot legally establish a rate which is not subject to review by the courts and that the meaning of the order and the obligation upon the defendant in making shipments was to pay such lawful rate as may be finally determined by the courts."

It further appears (Transcript, page 13) that the plaintiff transported for the defendant from points on its line in Washington and Idaho to points in other states, lumber, shingles and forest products, and that the charges thereon were paid according to the tariffs in force on and prior to October 31, 1907.

The agreed statement of facts (Transcript, page 13), contains the following:

> "That if payment had been made by the defendant on account of such shipments, according to the rates declared applicable thereto by the Interstate Commerce Commission by its reparation orders and decisions, the plaintiff would have received from said defendant on account of such shipments, in addition to the sum so paid therefor, the amount of $2805.65."

From the foregoing statement it is apparent that the transportation charges which the circuit court awarded to the plaintiff were those charges which were fixed by the Interstate Commerce Commission, and the only defense offered by the defendant was that a lesser rate should be fixed by the court than that declared by the Commission to be a reasonable rate.

The argument of the defendant involves a consider-

ation of certain decisions of the Commission which are referred to though not set out in the agreed statement of facts. After the tariffs above referred to were filed, which increased the rates from Washington and Idaho points to points in other states, and after the institution of the injunction suit above described, two proceedings were brought before the Interstate Commerce Commission, one by the Pacific Coast Lumber Manufacturers' Association and others, and the other by the Potlatch Lumber Company and others, both against the various carriers engaged in lumber transportation from Washington and Idaho points to the east. The first of these cases is reported in Volume 14, Interstate Commerce Commission Reports, 23, and the second in Volume 14, Interstate Commerce Commission Reports, 41.

In the first of these cases the rates known as the coast rates were challenged. It appeared that prior to November 1, 1907, the rate on fir lumber had been forty cents a hundred pounds from western Washington to Minnesota points with a slightly higher rate on cedar lumber and shingles, and that by the tariffs filed by the carriers the rate on fir lumber had been increased to fifty cents, with a corresponding increase on cedar lumber and shingles. The new tariffs also fixed rates to intermediate points which were higher than those theretofore in force. The Commission held in this case that the increase in rates over those in effect prior to November 1, 1907, to points west of a line drawn from Pembina, North Dakota, to Port Arthur, Texas, was not justified, but sustained one-half of the advance, or five

cents a hundred pounds, on shipments from western Washington to St. Paul, with a graded proportionate increase to all points between St. Paul and the Pembina-Port Arthur line.

The opinion and order in the case last referred to were rendered simultaneously and in connection with the opinion and order in the Potlatch Lumber Company case—Volume 14, Interstate Commerce Commission Reports, 41. In this case the increases in the new tariffs were likewise challenged, but principally on the ground that the shippers of eastern Washington and Idaho were entitled to a differential or a lower rate which would give them an advantage in transportation over the manufacturers of western Washington. By the tariffs of the carriers a differential was allowed on all lumber and forest products from what was denominated the Spokane district comprising points in Washington and Idaho to points in Minnesota of five cents under the coast rate, so that by the tariffs the rate on fir and pine lumber between these points was forty-five cents, with a greater differential to intermediate points. The Commission in considering the claim of the shippers from this district points out that, (a) under the tariffs in force prior to October 31, 1907, a differential was allowed from some points in this district to certain eastern territory, (b) that under the new tariff the carriers had extended this differential to other points, (c) that the western pine produced in this territory was inferior in quality and more expensive of production than the fir of the coast, but (d) that the territory con-

tained large quantities of *white* pine, more valuable than fir. With all these facts before it and considering together the complaints in the two cases specially referred to, and also certain other complaints made by the lumber manufacturers of Oregon and of southwestern Washington, the Commission entered its order and directed an adjustment by the establishment of three zones as the basis for the fixing of rates. These zones or groups of shipping points so made the basis for fixing rates were designated the "Coast Rates" group, the "Spokane Rates" group, and the "Montana-Oregon Rates" group. After defining the limits of these zones the Commission proceeded to fix the rates therefrom to eastern terminals, and designated the date when the rates so prescribed should become effective as October 15, 1908 (Transcript, page 39).

An examination of the opinion of the Commission in the Potlatch case (14 Interstate Commerce Reports, 41), will show that, while in a general way the Commission founded its division of territory and basing points largely upon the tariffs of the carriers which were attacked by the shippers, yet the relations of the rates from these various zones were largely modified.

In the case involving rates from the Pacific Coast, 14 Interstate Commerce Commission Reports, 23, reparation was distinctly asked and the Commission allowed the prayer requiring the carriers to repay to the shippers the difference between the amount paid from November 1, 1907, to October 15, 1908, over and above

the rates declared by the Commission to be effective on the latter date.

In the Potlatch case, however, the Commission distinctly points out that no reparation was prayed and allows none, except on the basis of the coast rates, but merely directs that from and after the date when its order fixing rates shall become effective there shall be established from the Spokane and Montana-Oregon districts rates less than the coast rates by the prescribed differential.

Upon the rendition of this decision by the Commission a petition was filed asking leave to amend and seeking reparation, in other words demanding that the differentials allowed be made retroactive, and to take effect as of November 1, 1907 (Transcript, page 16). This application was denied by order of the Commission, dated January 12, 1909 (Transcript, page 25). The Commission said:

> "No reparation was prayed in case 1348 (the Potlatch case). Complaint in said case 1348 did not bring in issue advanced rates of carriers, but it was a prayer for the establishment of new and higher differentials from Spokane territory under the coast rates. It was and is the intention of the Commission that shippers from the Spokane territory shall have reparation under said cases 1327, 1329 and 1335, as well as from any other territory covered thereby, but it was not and is not the intention of the Commission to award additional reparation because of the new differentials fixed in said case 1348."

Again application was made for a rehearing (Transcript, page 27), and again it was denied in similar unmistakable language (Transcript, page 33).

A careful reading of the opinions and orders of the Commission can leave no doubt that it was its purpose and intent to fix as a reasonable rate a maximum from coast points, effective October 15, 1908, and operative under the reparation order from November 1, 1907, and that it was the intention to give to the Spokane district and the Montana-Oregon district the full benefit of the coast rates so fixed from and after November 1, 1907, by way of reparation and otherwise, and also to adjust trade conditions and require the application of differentials under the coast rates from and after October 15, 1908. The orders of the Commission in so far as they affect rates from the Spokane and Montana-Oregon districts are based largely on the conditions of production in these districts as compared with the conditions of production in the coast territory. An examination of the opinion in the Potlatch case, 14 Interstate Commerce Commission Reports, 41, will further show that the scheme of differentials while adopting the territorial divisions adopted by the carriers, applies a very different scale from that fixed by the carriers. The amounts of the differentials under the coast rates is not the same nor are the differentials fixed by the Commission from various portions of the territory relatively the same.

ARGUMENT.

I.

The rates fixed by the Commission must control.

As has been made to appear by the foregoing statement the parties to this action are agreed that the amount awarded to the plaintiff by the judgment of the circuit court represents the transportation charges due from the defendant under the rates fixed by the Interstate Commerce Commission for the period commencing with November 1, 1907, and ending with October 15, 1908, when the new differentials prescribed by the Commission became effective. It follows, therefore, that when the defendant asks this court to reverse the judgment it thereby insists that this court fix a different rate for this period from that fixed by the Commission. It is settled beyond controversy that the performance of such a function is beyond the power of the courts. This whole question was fully argued before this court on the appeal from Judge Hanford's provisional injunction granted in this same controversy to preserve the *status quo* of the shippers and the carriers pending a determination of the reasonableness of the increased rates by the Commission. The case referred to is reported under the title, *Northern Pacific Railway Company versus Pacific Coast Lumber Manufacturers' Association,* 165 Federal Reporter, 1.

In that case it appeared that Judge Hanford had restrained the carriers from *collecting* the increased rates pending their investigation by the Commission, and on the appeal this court was urged to reverse the

order on the ground that its enforcement amounted to a judicial interference with the exclusive function of the Commission.

This court, however, declined to vacate the injunction, but on the sole ground that the purpose of the order was to preserve the status of the parties until the Commission could act. This court said:

> "Upon a careful consideration of the Interstate Commerce act, we find no ground on which to say that it impliedly denies the equitable jurisdiction to enjoin a threatened injury such as is alleged in the bill in the present case. It is true that the courts have no power to pronounce an interstate rate unreasonable or to declare what is a reasonable rate, but this is not to say that a court of equity may not enjoin the enforcement of a threatened ruinous schedule of rates which is proposed to be adopted in the future. * * * * * The case calls for the exercise of a power which is inherent in a court of chancery, the power to enjoin a proposed unlawful act. The exercise of that power does not invade the province of the Interstate Commerce Commission. It prohibits the enforcement of an alleged unreasonable rate only until the Commission shall have had time to adjudge the question of its unreasonableness. To afford such relief is not to fix rates or to change existing rates, or to decide on the reasonableness of established rates, or in any way to interfere with the functions of the Interstate Commerce Commission, nor does it result in the confusion or derangement of rates so forcibly pointed out as the ground of decision in the Abilene Cotton Oil case."

The demand of the defendant in seeking to have this court set aside the decision of the Commission and fix a new schedule of rates for the period in question manifestly requires the doing of all those things which this court says were not required to be done by the issuance of a temporary injunction and which it rightly declares a court may not do.

See *Texas and Pacific Railroad Company v. Abilene Oil Company,* 204 U. S. 424.

The doctrine of the *Abilene Oil Company Case* is reaffirmed in *Baltimore and Ohio Railroad Company versus United States, ex rel. Pitcairn Coal Company,* 215 United States, 490, 495. In that case the Commission had made an order directing the basis on which coal cars should be distributed by a carrier in times of temporary car shortage. The question was submitted to the court as to the effect of this order, and it was urged that though the order had been made by the Commission in the exercise of its administrative functions, it was competent for the court to enter upon an independent investigation of the propriety and reasonableness of the order. The court said:

> "Under these circumstances it is apparent, as we have said, that these amendments add to the cogency of the reasoning which led to the conclusion in the Abilene case, that the primary interference of the courts with the administrative functions of the Commission was wholly incompatible with the act to regulate commerce. This result is easily illustrated. A particular regulation of a carrier engaged in interestate commerce is assailed in the

courts as unjustly preferential and discriminatory. Upon the facts found, the complaint is declared to be well founded. The administrative powers of the Commission are invoked concerning a regulation of like character upon a similar complaint. The Commission finds, from the evidence before it, that the regulation is not unjustly discriminatory. Which would prevail? If both, then discrimination and preference would result from the very prevalence of the two methods of procedure. If, on the contrary, the Commission was bound to follow the previous action of the courts, then it is apparent that its power to perform its administrative functions would be curtailed, if not destroyed. On the other hand, if the action of the Commission were to prevail, then the function exercised by the court would not have been judicial in character, since its final conclusion would be susceptible of being set aside by the action of a mere administrative body. That these illustrations are not imaginary is established not only by this record, but by the record in the case of the *Illinois C. R. Co. v. Interstate Commerce Commission.*"

It seems to be insisted by the defendant that because the Commission fixed a system of differentials in favor of the Spokane district under the coast rates to become effective October 15, 1908, the rates represented by these differentials must be retroactive and take effect November 1, 1907. The authorities just referred to are in themselves a sufficient answer to this suggestion, for whatever may have been the consideration controlling the Commission in this respect it is enough to say that its determination is final and is not subject to re-

view by the courts. However, a reasonable and sufficient basis for the action of the Commission in this regard is manifest and constitutes a complete justification of its order. As has been pointed out the principal ground of complaint upon which the petitioners relied in the Potlatch case consisted in their showing as to the conditions under which their product was manufactured and sold as compared with the similar product of the coast territory. Conditions throughout the Spokane and Montana-Oregon districts were likewise dissimilar and the markets reached by the products of different portions of these two districts were likewise different. Certain of the shippers from this territory had availed themselves of Judge Hanford's injunction, and and were parties neither to the injunction suit nor to the certain shippers had acquiesced in the increased rate proceeding before the Commission.

In some instances the retroactive effect of a differential would enure to the benefit of the manufacturer, and in many instances only to the benefit of the consignee, the purchaser or the consumer. Under the tariffs in effect prior to November 1, 1907, from certain portions of this territory one set of differentials was in effect and under the carriers' tariffs effective November 1, 1907, another set of differentials covering a wider range of territory was prescribed. The Commission determined to establish, largely from commercial considerations, a third set of differentials and concluded, in view of the multitude of complications, that it would result in the greatest good to the greatest number if

this new and comprehensive differential adjustment should not be retroactive.

Even if it was within the province of the court to re-examine this question and review the action of the Commission in this regard it is apparent that such a review could not take place on this record in the absence of the immense volume of testimony which was considered by the Commission. The law has committed to the Commission the final determination of such questions as are here sought to be raised, and wisely so, for the burden of such investigations by the methods found to be necessary for the proper conduct of judicial inquiries would be unbearable.

Again, any reversal of the judgment in this case would necessarily result either in a rank discrimination in favor of this particular shipper as against its competitors or would involve the courts in the duty of reviewing and overthrowing the orders of the Commission in a myriad of cases in some respects similar but differing each from the other in material respects.

It is submitted that the judgment should be affirmed.

F. V. BROWN,
F. G. DORETY,
JAMES B. KERR,
Attorneys for Defendant in Error.